No. 14,037

United States Court of Appeals
Ninth Circuit

NORTHERN PACIFIC RAILWAY COMPANY, a corporation, *Appellant,*

vs.

TILLIE MELY, as Administratrix of the Estate of A. E. Mely, Deceased, *Appellee.*

BRIEF OF APPELLEE

Appeal from the United States District Court for the District of Idaho. Central Division.

HONORABLE CHASE A. CLARK,
United States District Judge.

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FACTUAL OUTLINE

The collision which gave rise to this action for damages occurred at the hour of 11:30 A. M. on November 11, 1951, on the Spokane-East Lewiston Division of the Northern Pacific Railway about three-fourths of a mile west from the Station of Arrow, Idaho, between a train known as "Extra 6015 East," consisting of a four unit diesel, with 15 cars attached, and a train known as "Extra 1648 East," consisting of an engine with 86 cars attached. Neither train was operating on a regularly prescribed schedule, but train 6015 East was then being operated under special train orders issued by the train dispatcher located at East Lewiston, Idaho. (R. 80.)

The evidence shows without conflict that train 6015 East was started from East Lewiston, Idaho, under train orders reading:

> "Engine N. P. 6015 run extra, East Lewiston to Arrow, will not register at Spalding, number 661 has passed Spalding." (R. 80.)

The train order made no mention of train 1648 East, and the crew of train 6015 East proceeded under said train order without any knowledge on the part of the crew members that train 1648 East was ahead on the same track (R. 80) and without any knowledge on the part of the crew members of train 1648 East that train 6015 East was following. (R. 51.) Such is the undisputed evidence in this case.

It is alleged in the complaint (R. 5), and admitted in the answer (R. 10), that A. E. Mely was the engineer of defendant's engine No. 6015 East, which collided with a train of cars being hauled by defendant's engine No. 1648 East. Both engines left East Lewiston, Idaho on the morning of the 11th of November, 1951, engine 1648 East at 9:15 or 9:20 A. M. (R. 39); engine 6015 East left East Lewiston, Idaho at 10:35 A. M. (R. 41), both headed in the same direction on a single track railroad, —(track shown in photographs). None of the crew members of either train knew of the presence of the other train upon this single track (R. 50-51)-(R. 80). The dispatcher at East Lewiston delivered the train orders to the crew of train 6015 East without notifying any of the crew members that train 1648 East was ahead (R. 80).

At the time engine 6015 East pulled out of East Lewiston, 10:35 A. M. (R. 41), engine 1648 had not arrived at Arrow Station, and did not arrive there until 10:40 or 10:45 A. M., (R. 41). There was a dispatcher at East Lewiston (R. 79) and a station agent at Arrow Station (R. 47), who could have phoned and determined that train 6015 East was running extra to Arrow Station. (R. 167-168.) The collision occurred at 11:10 A. M., (R. 45). Train No. 661, mentioned in the train order, was west bound. (R. 80.)

The box cars on the South siding at Arrow Station were observed by Mely's crew on the day previous to the collision (R. 88), and they were in the same position, on the siding, on the day of the accident (R. 88). The rear of the West box car on the South siding was 346 feet west of the rear of the caboose at rest on the main line. (R. 36.) There were fifty or sixty logging cars at the rear of the standing train No. 1648 East (R. 44) which were only 3½ feet in height, or about as high as an ordinary flat car (R. 44). There were no block signals on this track. (R. 51), (R. 81.)

The photographs in evidence show that there were two sharp 'S' curves west of the caboose of train 1648 East which impaired the vision of an approaching engineer, such as engineer Mely, of the main track or objects thereon, as likewise did the brush and trees that were growing alongside the side track. There being no block signals (R. 81), the crew of 6015 depended solely on their senses of sight and hearing to determine obstructions ahead. The logging cars were obscured by the box cars on

the South siding (R. 86), and the caboose of train 1648 was not as high as the box cars on the South siding. (R. 139.) In answer to a hypothetical question (R. 141-142), Merle C. Myhre (misspelled Maury in transcript), stated that Rule 108 and Rule 99 here govern the situation presented (R. 148-149), and also Rule 101 (R. 152). Witness Myhre explained the circumstances under which Rule 99 applied (R. 167).

The caboose of train 1648 was 603 feet east of the West switch (R. 195), and the first curve 42 feet west of the West switch (R. 194). Appellant's witness testified Mely's train could have been stopped between 700 and 800 feet if going at 30 miles an hour (R. 228-229), but the evidence shows that Mely had only 645 feet of straight track in which to stop his train. In making the test run, appellant's witness said:

> "A. The caboose was on the side track when the test run was made.
> Q. Why was the position changed,
> A. Well, to avoid a second accident in case they could not get stopped in the distance they neeeded—they did not want another accident." (R. 192.)

Mely's train left North Lapwai at 11:04 A. M., (R. 196), the collision occurred at 11:10 A. M. (R. 196). The distance from North Lapwai to the caboose of train 1648 is 3.1 miles (R. 194). It took engineer Mely six minutes to travel 3.1 miles, or an average speed of about thirty miles per hour. He was not traveling within yard limits the full route, and, therefore, may have exceeded a speed of thirty miles per hour outside yard limits.

A. E. Mely's average earnings for three years previous to his death amounted to an average monthly wage of $537.61 (R. 128). His expectancy of life 17.4 years (R. 36). His widow's expectancy of life 20.2 years (R. 36), and her pecuniary loss by reason of the death of her husband amounted to $150.00 or $170.00 per month (R. 128). There were no children.

COMMENT ON APPELLANT'S STATEMENT OF CASE.

On page 5 of appellant's brief it is asserted that certain material facts are undisputed. We draw to the Court's attention the fact that there is a dispute as to whether or not train number 6015 was being operated at restricted speed prior to the collision, and this regardless of the speed tape on engine number 6015. The fireman of engine 6015, Frank A. Reisenbigler, testified as follows:

> "Q. Was there anything unusual in the speed of that train that drew your attention to the speed?
> A. No, sir." (R. 79.)

The brakeman of train 6015, A. G. Ferris, testified as follows:

> "Q. Was there anything unusual in the speed of the train that you noticed?
> A. Not that I noticed, or was conscious of, no, sir." (R. 106.)

OPERATING RULES AND GENERAL INSTRUCTIONS

(Ex. 24; R. 154.)

According to the rule book, Ex. 24, on page 6, under the heading "definition," appears the following:

> "Train of superior right—a train given precedence by a train order." (Ex. 24, p. 6.)

RULE "S"—71. reads as follows:

> "S-71: A train is superior to another train by *right*, class or direction.
>
> Right is conferred by *train order;* class and direction by time-table.
>
> *Right* is superior to class or direction.
>
> Direction is superior as between trains of the same class." (Ex. 24, page 39.)

The train order and the operating rules relied upon by appellant are not dissimilar from those construed in Chicago, R. I. & P. R. Co. v. Wright, 239 U. S. 548, 36 S. Court. 185; 60 L. Ed. 431, wherein the reasonableness of the rules was submitted to the jury as a question of fact, and the same is true of the following rules involved in Southern Ry. Co. v. Craig (4 Cir.), 113 Fed. 76.

The Court fully charged on the operating rules introduced in evidence, and other general rules read to the jury by counsel, and without objection permitted the jury to take the rule book with them to the jury room (R. 247-248). Rule 995 reads as follows:

> "RULE 995: Train dispatchers will issue train orders, and will transmit and record them as prescribed by the rules * * *." (Ex. 24, page 212.)

Rule 997 reads as follows:

> "RULE 997: Train dispatchers must guard against dangerous conditions in train movements and improper or unsafe combinations in train orders." (Ex. 24, page 212.)

The complaint (R. 7) charged negligence in failure to give engineer Mely any warning of the danger ahead. The train order was an express direction for him to proceed to Arrow Station and surely caused Mely to rely upon the implied assurance that, except for opposing train 661, no other train was on the track. Mely's operation was in obedience to the train order, and the jury undoubtedly found him justified in assuming a 'clear track ahead' with the superior right to run straight through to Arrow Station. Thus, the dispatcher's train order might be considered as a fault; it certainly contributed to the collision. Miller v. Central R. Co. of New Jersey (2nd Cir.) 58 Fed. (2d) 635, 636.

We do not believe this conclusion to be at variance with the language used by this Court in Atchison, T. & S. F. Ry Co., v. Seamas (9th Cir.) 201 F. (2d), 140, where distinction is drawn between negligent conduct and contributory negligence in regard the right of an employee to assume that the master has used ordinary care for the employee's safety. The jury could consider that defendant was negligent when its dispatcher sent both crews in the same direction on a single track without telling them specifically of the presence of the other. Williams v. Reading Co., 99 Fed. Supp. 960, 962.

PREFACE.

"Every event is the result of prior causes and itself the cause of future events."

Beyond the High Himalayas, p. 153,
By Justice William O. Douglas.

APPELLATE REVIEW.

"The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the Court, which is the fact-finding body. It weighs contradictory evidence and inferences, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable."

Tennant v. Peoria & Pekin Union Ry. Co., 321 U. S. 29; 64 S. Ct. 409, 88 L. Ed. 520.

In actions under the Federal Employers' Liability Act, "once there is a reasonable basis in the record for concluding that there was negligence which caused the injury, it is irrelevant that fair-minded men might reach a different conclusion. For then it would be an invasion of the jury's function for the Appellate Court to draw contrary inferences, or to conclude that a different conclusion would be more reasonable."

Ellis v. Union Pac. R. Co., 329 U. S. 649, 67 S. Ct. 598, 91 L. Ed. 572.

Although Rule 61 of the Federal Rules of Civil Procedure is intended primarily for the guidance of the trial

court, it seems to be the consensus of opinion that this particular rule should be heeded by the Court of Appeals, so as to make it effective. We cite the following cases adhering to this principle:

> Gillis vs. Keystone Mut. Cas. Co., C. A. Ky., 1949, 172 Fed. (2d) 826; certiorari denied, 70 S. Ct. 67, 338 U. S. 822, 94 L. Ed. 499.

See also,

> DeSanta vs. Nehi Corp., C. A., N. Y., 1948, 171 F. (2d) 696;
>
> University City vs. Home Fire & Marine Ins. Co., C. C. A., Mo., 1940, 114 F. (2d) 288.

We quote Rule 61:

> "RULE 61, HARMLESS ERROR.
>
> No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the Court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the Court inconsistent with substantial justice. The Court at every stage of the proceeding must diregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

COMPARATIVE NEGLIGENCE RULE.

The Court, in Tiller v. Atlantic Coast Line R. Co., 318 U. S. 54, 63 S. Ct. 444, 87 L. Ed. 610 explained the Assumption of Risk and contributory negligence doctrine as applied to the 'primary duty rule' in which *contributory negligence through violation of a company rule*, became assumption of risk, when it said on the question of proximate cause: "In this situation the employer's liability is to be determined under the general rule which defines negligence as the lack of due care under the circumstances; or the failure to do what a reasonable and prudent man would ordinarily have done under the circumstances of the situation or doing what such a person under the existing circumstances would not have done." Congress swept into discard with the adoption of the 1939 amendment to the Act the employee's burden from assumption of risk by whatever name it may be called, and the adoption of this amendment did "establish the principle of comparative negligence, which permits the jury to weigh the fault of the injured employee and compare it with the negligence of the employer, and, in the light of the comparison, do justice to all concerned." This learned opinion demonstrates the fact that even before the 1939 amendment, violation of a company rule amounted only to contributory negligence but became, through judicial interpretation, assumption of risk sufficient to bar the action. Since the assumption of risk doctrine no longer applies, nothing remains but questions of negligence and contributory negligence in actions under this particular Act.

STATUTORY LAW.

"Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment. * * *." 45 U. S. C. A., 51.

"In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: provided, that no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee." 45 U. S. C. A., 53.

"That in any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee." 45 U. S. C. A., 54.

ARGUMENT.

We have carefully checked the cases cited by appellant in support of a reversal of the judgment in this case, and we state affirmatively to this Court that in appellant's table of cases there is not one case cited that was not decided prior to the 1939 amendment to the Federal Employer's Liability Act, 45 U. S. C. A. 51, et seq., or when the event occurred after the passage of the 1939 amendment. Every case cited by appellant dealing with the Federal Employer's Liability Act has application to the "primary duty rule" in which contributory negligence through violation of a company rule or specific order became assumption of risk, and are the type of cases which were swept into discard with the adoption of the 1939 amendment to the Federal Employer's Liability Act, releasing the employee from the burden of assumption of risk by whatever name it was called. Tiller v. Atlantic Coast Line R. Co., 318 U. S. 54, 63 S. Ct. 444; 87 Law Ed. 610.

In the decision of the Court of Appeals, Tiller v. Atlantic Coast Line R. Co., (4th Cir.) 128 Fed. (2d) 420, the Court rejected the argument that since the doctrine of assumption of risk had ben abolished, the carrier could no longer interpose it as a shield against the consequences of its negilgence. The injured employee contended that by reason of the amendment the carrier could no longer rely upon a company rule to defeat his action under the guise that the employee had assumed the risk, "in failing to be on the lookout for his own safety so long as the train movement was not unusual." On appeal to the Supreme Court of the United States, Tiller vs. Atlantic Coast Line R. Co., 318 U. S. 54, 63 S. Ct. 444, 87 L. Ed. 610, the Court rejected all cases decided before the 1939 amendment which dealt with assumption of risk through violation of Company rules, and the Court said:

> "We hold that every vestige of the Doctrine of Assumption of Risk was obliterated from the law by the 1939 amendment, and that Congress, by abolishing the defense of assumption of risk in that statute, did not mean to leave open the identical defense for the master by changing its name to 'non-negligence'."

Further in the same case, and after analyzing the application of the "primary duty rule," "promise to repair," "simple tool" and "peremptory order" concepts into the assumption of risk doctrine, the Court said:

> "The adoption of this proposed amendment will, in cases in which no recovery is now allowed, establish the principle of comparative negligence which permits the jury to weigh the fault of the injured employee and compare it with the negligence of the

employer, and, in the light of the comparison, do justice to all concerned."

And in the closing paragraphs of that decision, the Court held:

"We see no reason, so long as the jury system is the law of the land, and the jury is made the tribunal to decide disputed questions of fact, why it should not decide such questions as well as others,"

Or, as we have put it on another occasion,

"Where the facts are in dispute, and the evidence in relation to them is that from which fair-minded men may draw different inferences, the case should go to the jury."

Tiller v. Atlantic Coast Line R. Co., 318 U. S. 54, 63 S. Ct. 444, 87 L. Ed. 610.

Section one of the Act makes the carrier liable in damages for injury or death "resulting in whole or in part from the negligence" of any of its "officers, agents, or employees." The rights which the Act creates are Federal rights protected by Federal, rather than local rules of law, and those Federal rules have been largely fashioned from the common law, except as Congress has written into the Act different standards.

Bailey v. Central Vermont R. Co., 319 U. S. 350; 63 S. Ct. 1062; 87 L. Ed. 1444.

NEGLIGENCE.

Liability imposed by the Federal Employer's Liability Act is for negligence of any officer, agent, or employee of the carrier, or for any defect or insufficiency, due to the carrier's negligence in its appliances, road-bed, or other equipment, and is to be determined by the general rule, which defines negligence as the lack of due care under the circumstances, or the failure to do what a reasonable and prudent person would ordinarily have done under the same or similar circumstances, or doing what such a person under the same or similar circumstances would not have done. Tiller v. Atlantic Coast Line R. Co., 318 U. S. 54; 63 S. Ct., 444, 87 L. Ed. 610.

The railroad maintained no automatic block signal system on this particular track (R. 81. Conceding that the railroad was not negligent in failing to provide a block signal system, this fact alone would not prevent the jury from holding the railroad to a greater degree of caution than if the system was blocked. To subject an employee, without warning, to unusual dangers not normally incident to the employment, is itself an act of negligence, and the jury could hold the employer liable by viewing its conduct as a whole, especially, as here, where the elements indicating negligence are closely interwoven and where each imparts character to the other. Knowledge of danger may be essential in an unblocked track system while unnecessary if the system is blocked, and the employee has a right to assume that the employer has exercised proper care with respect to providing him a reasonably safe place to work, and this includes care in establishing

a reasonably safe system or method of work. The standard of care is measured by the dangers of the business, and must be commensurate therewith. The greater the danger the higher the care.

Blair v. B. & O. R. Co., 323 U. S. 600, 65 S. Ct. 545; 89 L. Ed. 490;

Wilkerson v. McCarthy, 336 U. S. 53; 69 S. Ct. 413, 93 L. Ed. 497;

Chesapeake & Ohio Ry. Co. v. Proffitt, 241 U. S. 462, 36 S. Ct. 620; 60 L. Ed. 1102.

The employer's duty to its employees is to use reasonable care and prudence to the end that the place in which they are required to work, and the appliances with which they work, are reasonably suitable and safe for the purpose and in the circumstances in which they are to be used. The test is not whether the tools to be used and the place in which the work is to be performed are absolutely safe, nor whether the employer knew the same to be unsafe, but whether or not the employer has exercised reasonable care and diligence to make them safe, Atlantic Coast Line R. Co. v. Dixon (5th Cir.), 189 Fed. (2d) 525, and this too becomes imperative and exacting as the risk increases, Larsen v. Chicago & N. W. R. Co., (7th Cir.) 171 Fed. (2d) 841. The duty of furnishing the employee with a reasonably safe place to work is firmly ingrained in the decisions of our Federal Courts. It is a continuing one from which the carrier is not relieved by the fact that the employee's work at the place in question is fleeting or infrequent, Bailey v. Central Vt. R. Co., 319 U. S. 350; 63 S. Ct. 1062; 87 L. Ed. 1444, and

this, too does not have reference only to the physical condition of the place itself, but also has reference to the negligent acts of fellow employees, and the Court is required to charge upon such duty of the employer, regardless of the lack of allegation in the complaint, because in law this is known as legal-negligence. Denny v. Montour R. Co., 101 Fed. Supp. 735, citing Griswold v. Gardner, (7th Cir.) 155 Fed. (2d) 333, and Bailey v. Central Vermont R. Co., 319 U. S. 350; 63 S. Ct. 1062; 87 L. Ed. 1444.

It was the duty of the defendant company to the crew members of both trains, to take reasonable care and precaution to prevent trains on this single track railroad from colliding, and to exercise reasonable care to notify or cause to be notified, the operatives of both trains of the presence of the other train, and to give such orders as would acquaint the crew members with the conditions and circumstances then and there presented. Northern Pacific Ry. Co. v. Mix, (9th Cir.) 121 Fed. 476, 481. Appellant's brief (pages 22-24) correctly quotes statements of the crew members of each crew showing they had no knowledge of the other train upon this single track railroad. Appellant attempts to evade the effect of this testimony by stating that no duty devolved upon the Railroad Company to give the crew members notice, but none of the authorities cited sustain this view. It is alleged in plaintiff's complaint (R. 5), that engine 6015 had the right-of-way and was a through-train and the Court so instructed in regard the allegations of the complaint (R. 238-239), also, appellant attempts to evade this

duty by saying (App. Br. 24) that there was no operating rule of the Company that required notice to be given to the crew members. Regardless of operating rules, the law fixes the duty and the standard of care required to fulfill the duty, and that standard is what a reasonable man would or would not have done under the circumstances. Appellant further claims (App. Br., p. 24) that the failure to furnish a safe place to work applies or refers only to defective train equipment or right-of-way conditions, but the failure to furnish a safe place to work refers also to the negligence of any officer, agent, or employee. Denny v. Montour, 101 Fed. Supp. 735, and cases therein cited.

A case of particular interest is that of N. Y., N. H. & H. & H. R. Co. v. Zermani, (1st Cir.), 200 Fed. (2nd) 240, in which the Court held that a jury would be warranted, under the circumstances of the case, in inferring that the defendant was negligent in its supervision and conduct of a classification operation. The Court cites many of the recent cases decided since the 1939 amendment.

To determine whether there was a continuous succession of events leading proximately from fault to injury, the test is not whether the employee was acting in performance of his duty when injured, but whether his act was a normal response to the stimulus of a dangerous situation created by the fault. New York, C. & St. L. R. Co. vs. Affolder, (8th. Cir.), 174 Fed. (2nd) 486.

Appellee will now answer each specification of error in appellant's brief, commencing with Specification of Error No. 2 (App. Br., p. 46).

ANSWER TO SPECIFICATION OF ERROR NO. 2

This specification of error is based on the asserted fact that the judgment was contrary to the weight of the evidence, and that there was no substantial evidence that the defendant was guilty of negligence which, in whole or in part, contributed to the death of engineer Mely. Appellee takes the position, as well as did the lower Court, that there was a sufficient showing of negligence on the part of the carrier, even though engineer Mely might have been contributorily negligent. As was said in Louisville & N. R. Co. v. Hood, 149 Ga. 829, 102 S. E. 521, 523 (a case under the Federal Employer's Liability Act): "If the defendant was negligent, and negligent in such a way as to bring about or contribute to the injury, the fact that the plaintiff failed to exercise diligence, when under the circumstances by the exercise of diligence, he might have avoided the injury, in nowise makes his negligence the sole cause of the injury." Cited in Mumma v. Reading Co., (3 Cir.), 146 Fed. (2d) 215, 218; also citing Union Pac. Railroad Co. v. Hadley, 246 U. S. 330, 333, 38 S. Ct. 318, 62 L. Ed. 751. "It is only where the alleged negligent act or omission on the part of the employee was the sole proximate cause of his injury, without any contributing causation on the part of the employer, that the employee will be denied in toto a right of recovery under the Federal Employer's Liability Act. See Grand Trunk Western Ry. Co. v. Lindsay, 233 U. S., 42, 47, 49, 34 S. Ct. 581, 58 L. Ed. 838. The Court below very properly refused to enter judgment for the defendant. n.

o. v. on either of the grounds above discussed." Mumma v. Reading Co. (3rd Cir.) 146 Fed. (2d) 215, 218.

ANSWER TO SPECIFICATION OF ERROR NO. 4.

The Court treated both contestants impartially when it refused to instruct on each particular rule introduced in evidence or read to the jury, or on any particular rule, but instead instructed generally on the questions of duty, negligence and proximate cause. Appellant's instruction number 6 (R. 11), pertaining to railroad Rule 93 was properly refused because it directed the jury's attention to the fact that Extra 6015 East was an inferior train, whereas, under the train ordering directing engineer Mely to proceed to Arrow Station, and the Company rules making it a train of superior right, the jury had ample grounds to determine if protection should have been given as prescribed by Company Rule 99 introduced by appellee, and, furthermore, failure of the train dispatcher to impart notice or knowledge to the crew of 6015 that 1648 was ahead, stands uncontradicted, as likewise was the dispatcher's failure to notify the crew of 1648 that train 6015 was following. If the jury determined this failure to be negligence on the part of dispatcher, which it doubtless did, then the dispatcher's negligence, cannot be excused by reason of any possible assumption of risk or contributory negligence on engineer Mely's part in order to negate an inference that death was due to the employer's negligence, and the question of proximate cause, in whole or in part, was for the jury. Tennant v. Peoria

Union R. Co., 321 U. S. 29, 64 S. Ct. 409; 88 L. Ed. 520. Northern Pacific Ry. Co. v. Mix (9th Cir.) 121 Fed. 476, 481. Frabutt v. N. Y. C. & St. L. R. Co., 88 Fed. Supp. 821.

Violation of a Company rule for conduct of its employees, at most, amounts to contributory negligence or assumption of risk, neither of which is a defense under the Act. Bocook v. Louisville & N. R. Co., 67 Fed. Supp. 154; McCarthy v. Pennsylvania R. Co., 156 Fed. (2d) 877; certiorari denied. 329 U. S. 812, 67 S. Ct. 635; 91 L. Ed. 693.

The rules of railroad carriers have always been a source of confusion to the courts. On the first appeal, Atchison, T. & S. F. Ry. Co. v. Ballard (5th Cir.) 100 Fed. (2d) 162, the Court made a convincing argument why rules 93 and 99 were in conflict, and why the rule requiring the engineer to operate his train at "restricted speed" was very indefinite, but on the second appeal, Atchison, T. & S. F. Ry. Co. v. Ballard (5th Cir.) 108 Fed. (2d) 768, the same Court, over a strong dissenting opinion, made a profound argument to the effect that Rules 93 and 99 were not in conflict, and in light of the definition the term "restricted speed" was most definite. [Prior to his appointment as Secretary of State, John Foster Dulles made a convincing argument that the Bricker amendment to the Constitution of the United States should be adopted, but after he was appointed Secretary of State, he made just as convincing an argument why the Bricker amendment should not be adopted.]

It is hard to do unless one has had practice on "the flying trapeze." The law of the Atchison case, which arose prior to the 1939 amendment, has no application to the law as announced by the Supreme Court of the United States in the Tiller case.

The jury was instructed that the plaintiff was not entitled to recover if Mely was negligent, and his negligence was the sole proximate cause of his injuries. We quote the language of the Court in its instructions to the jury.

> "If you find from the evidence in this case that under all of the circumstances, engineer Mely failed to exercise reasonable care for his own safety, then he was guilty of negligence; and if you further find that such negligence was the sole proximate cause of his death, plaintiff is not entitled to recover." (R. 246.)

Special findings were neither requested by either party, nor given by the Court to the jury. It is only when the employee's act is the sole cause,—when defendant's act is no part of the causation—that defendant is free from liablity under the Act.

> "A rule promulgated by a railroad that a train entering yard limits must protect itself is contrary to the contractual obligation of the railroad to protect its train crews, and cannot be used by the railroad as a device to escape liability for its breach of duty to use reasonable care to furnish its employees with a safe place to work, otherwise the employees assume all of the risks of their employment contrary to the 1939 amendment to the Act abolishing the doctrine of assumption of risk."

Cato v. Atlantic and C. A. L. Ry. Co. (S. C.) 162 S. E. 239, certiorari denied; 284 U. S. 684, 52 S. Ct. 200, 76 L. Ed. 577.

Under the Act, the negligence of an employee is not a bar to recovery, but is only a matter affecting the amount of the recovery. Disobeying a rule of a railroad company is negligence merely, and not different in its legal effect than is negligence in other forms. Cross v. Spokane, P. S. Railway (Wash.) 291 Pac. 336, 341. Certiorari denied, 283 U. S. 821; 51 S. Ct. 345, 75 L. Ed. 1436, and whether the defendant breached its duty of maintaining a safe place to work, and is thus guilty of negligence, is a question for the jury.

Wilkerson v. McCarthy, 336 U. S. 53, 69 S. Ct. 413, 93 L. Ed. 497;

Shiffler v. Penn. R. Co. (3rd Cir.) 176 Fed. (2d) 368.

ANSWER TO SPECIFICATION OF ERROR NO. 5

The case of Denny v. Montour R. Co., 101 Fed Supp., 735, and cases therein cited, is a sufficient answer to this specification of error.

ANSWER TO SPECIFICATION OF ERROR NO. 6

The case of Southern Railway Co. v. Craig (4 Cir.) 113 Fed. 76, certiorari denied, 187 U. S. 641, 47 L. Ed. 345, wherein the Court stated that notwithstanding the rules of the company, it was the duty of the crew of the switch engine to exercise ordinary care in avoiding a collision with an incoming train, is sufficient answer to

this specification of error, together with what we have previously said in answer to Specification of Error Number 4.

ANSWER TO SPECIFICATION OF ERROR NO. 7

Error is alleged because of the introduction of expert testimony by witness Myhre (not "Maury"). The lower Court should be sustained on two theories, that is, (1): The law has been decided against appellant in the case of Haines v. Reading (3rd Cir.) 178 Fed. (2d) 918. This was the only question involved in the appeal in that case; and (2): For the reason that the Court, when settling the instructions, offered to instruct the jury to disregard the expert testimony given in the case, but counsel for both parties refused the Court's offer, and thereby each of the parties waived any error that could possibly arise from the introduction of the expert testimony. The Court in its order denying appellant a new trial, or a judgment, n. o. v., said:

> "However, it is not necessary for the Court to pass on this question, because the propriety of the testimony was waived by counsel for both parties when they refused the Court's offer to instruct the jury to disregard this portion of the testimony." (R. 32-33.)

As will be noticed from the order the testimony referred to was the testimony of the expert witnesses.

CONCLUSION.

The learned District Judge demonstrated throughout the trial his thorough grasp and legal understanding of the modern decisions as applied to the Federal Act, since the 1939 amendment. There being no conflict in the evidence as to the negligence of the train dispatcher, under the conditions shown in the record, in failing to notify each crew of the presence of the other train, the Court, if the verdict had gone against the plaintiff, would have been justified in granting her a new trial.

We submit that the authorities cited in appellant's brief cannot withstand the impact of the law, as stated in the Tiller, Wilkerson and other cases cited in this brief. Judgment should be affirmed.

Respectfully submitted,

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